

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL FROM THE STATE MEDICAL BOARD**

In the Matter of)
)
 JAY ABBOTT, M.D.) OAH No. 09-0397-MED
)
 _____)

DECISION

I. Introduction

The Department of Commerce, Community, and Economic Development, Division of Corporations, Business and Professional Licensing (“the division”) filed an Accusation alleging unprofessional conduct on the part of the respondent, Jay Abbott, M.D. At Dr. Abbott’s request, a hearing was held on November 3, 2009. Dr. Abbott appeared by telephone. Assistant Attorney General Karen Hawkins represented the division.

Based on the undisputed facts, Dr. Abbott failed to report the settlement of a medical malpractice claim in which damages were paid on his behalf on a prescribed form within 30 days of the settlement, an omission that is an act of “unprofessional conduct” as that term is defined in Alaska. Consistent with previous similar cases, disciplinary sanctions are imposed in the form of an official reprimand and civil fine of \$1,000.

II. Facts

Dr. Abbott applied for a license to practice medicine in Alaska on November 19, 2001. A temporary license was issued on January 15, 2002, followed by issuance of Medical License Number S 4843 on May 23, 2002. Dr. Abbott renewed his license for licensing periods 2003-2004, 2005-2006, 2007-2008, and 2009-2010.

Dr. Abbott has a long and distinguished career in a number of states. Since closing his private practice in another state in 2000, Dr. Abbott has provided *locum tenens* orthopedic coverage around the country. Besides Alaska, Dr. Abbott is licensed in good standing to practice in Connecticut, Massachusetts, Maine, Tennessee, New Hampshire, New York and Vermont, with privileges in approximately sixteen hospitals. Dr. Abbott has provided orthopedic coverage several times at Bartlett Regional Hospital in Juneau. He has provided several letters of reference from Alaskan physicians documenting his good character and fitness to practice.

Dr. Abbott’s initial application asked if any medical malpractice claims had ever been filed against him. Dr. Abbott reported three cases, including a 1998 case alleging failure to diagnose. The application to renew for the 2003-2004 period asked whether a medical

malpractice or civil action had resulted in payment of damages on the applicant's behalf. Dr. Abbott answered "no" to this question on November 18, 2002, and again on November 29, 2004, for the 2005-2006 licensing period.

On December 26, 2006, the division received Dr. Abbott's renewal application for the 2007-2008 licensing period. To the question asking whether a claim or action had resulted in payment of damages, Dr. Abbott answered "yes." Dr. Abbott attached a document with a claim number of 3789-1 and a reference to MIIX insurance company. Dr. Abbott also provided information about a different pending action that might go to trial.

On the same day it received Dr. Abbott's renewal form for the 2007-2008 licensing period, the division received a Medical Malpractice Payment Report from the National Practitioner Data Bank for case number 3789-1 indicating that a single final payment had been made for the case in the amount of \$550,000 on November 2, 2004. The division checked its records, and learned that Dr. Abbott had not reported the settlement prior to the application for his 2007-2008 license renewal. On May 31, 2007, Dr. Abbott was informed that his file was being referred for investigation of his failure to report the settlement within 30 days. Shortly after receiving a copy of the appropriate reporting form from the division, Dr. Abbott provided a report of the settlement on September 15, 2008.

Although the case was settled on November 2, 2004, the letter from the insurance company informing Dr. Abbott of the settlement was dated December 10, 2004, 39 days after the settlement. Dr. Abbott did not receive the letter until later in December, about a month after submitting his renewal application for the 2005-2006 licensing period. The letter from the insurance company advised Dr. Abbott that

The Health Care Quality Improvement Act of 1986 and its implementing regulations require us to report certain information about this claim to the National Practitioner Data Bank (NPDB), as well as to state licensing authorities. Regulations propounded by the Department of Health and Human Services mandate the form we must use and the information we must provide.

Dr. Abbott assumed that the insurance company's report "to state licensing authorities" and the NPDB would meet the requirements of the states he was licensed in. Dr. Abbott was not aware that Alaska state law also requires physicians to file their own reports within 30 days of the settlement on a special form for the purpose.

III. Discussion

According to AS 08.64.345,

A person licensed under this chapter shall report in writing to the board concerning the outcome of each medical malpractice claim or civil action in which damages have been or are to be paid by or on behalf of the licensee to the claimant or plaintiff, whether by judgment or under a settlement. This report shall be made within 30 days after resolution of the claim or termination of the civil action.

The board has implemented this requirement through a regulation, 12 AAC 40.930, which reads:

(a) A person licensed under this chapter shall submit to the board a signed, notarized report on a form provided by the department, explaining the outcome of each malpractice claim or action against the licensee in which damages have been or are to be paid, whether by judgement [*sic*] or settlement. Reports shall be submitted to the board within 30 days of the date of the resolution of the claim or action.

* * * * *

(c) Failure to submit a malpractice report required by this section constitutes unprofessional conduct under 12 AAC 40.967 and is subject to disciplinary action by the board.

12 AAC 40.967, the cross-referenced provision, provides in part,

For purposes of AS 08.64.240(b) and AS 08.64.326, "unprofessional conduct" means an act or omission by an applicant or licensee that does not conform to the generally accepted standards of practice for the profession for which the applicant seeks licensure or a permit under AS 08.64 or which the licensee is authorized to practice under AS 08.64.

The remainder of 12 AAC 40.967 adds that “‘unprofessional conduct’ includes the following,” with a list of twenty-nine specific acts or omissions. These examples encompass “failing to disclose material information to . . . renew a license,”¹ but do not include the omission covered in 12 AAC 40.930.

Dr. Abbott does not dispute that he failed to report the 2004 malpractice settlement within 30 days. The reason Dr. Abbott did not report the settlement is that he was not aware that he was required to do so within 30 days. It was Dr. Abbott’s belief that the only requirement was that he truthfully report the settlement when asked on his next license renewal application, which he did. Dr. Abbott also thought that any more immediate reporting requirements would be met by the settlement’s appearance in the National Practitioner Data Bank and the insurance company’s report to “state licensing authorities.”

While he does not dispute that he failed to report the settlement within 30 days, Dr. Abbott argues that he should not be found to have engaged in unprofessional conduct, and he

suggests that this case should be dismissed with a warning. Dr. Abbott provides a single basis for this argument: that the regulations cited above should be interpreted to require demonstration of a knowing omission or a failure to disclose information when asked for it. Dr. Abbott also argues that the division's proposed penalty of a \$1,000 civil fine and a reprimand is excessive.

Elaborating on his first argument, Dr. Abbott invites consideration of

how statutes 12 AAC 40.930 and 40.967 relate to each other. For instance, I think it could be interpreted that under the intent and spirit of 967, to be labeled with unprofessional conduct, one would (1) knowingly omit information or (2) fail to disclose in order to renew a license. I did neither. When the thirty-day requirement under 930 was introduced in 2001, why would the authors have referred back to 967 if they hadn't meant to abide by the intent of 967?

The relationship between the cited regulations and applicable statutes is not obscure. AS 08.64.326(a)(9) authorizes the board to impose disciplinary sanctions for unprofessional conduct. 12 AAC 40.967 defines "unprofessional conduct." Unprofessional conduct is any act or omission that does not conform to the generally accepted standards of practice for physicians. With AS 08.64.345 the legislature has required physicians to report settlements or judgments that award damages in malpractice claims. 12 AAC 40.930(a) provides more detail of the statutory duty imposed by AS 08.64.345. 12 AAC 40.930(c) merely clarifies that compliance with the statutory reporting requirement of AS 08.64.345 is to be regarded as a generally accepted standard of practice, and that failure to comply is unprofessional conduct that may result in disciplinary action under AS 08.64.326.

Dr. Abbott points out that under 12 AAC 40.967 "unprofessional conduct" includes actions as serious as being convicted of rape or murder, and he argues that failing to report a malpractice settlement within 30 days could not have been intended to be included with such egregious offenses, particularly when the physician did ultimately report the settlement when asked on the next period's licensing application form, was aware that the settlement would be available through the national database, and was unaware of the duty to report within 30 days.

12 AAC 40.967 provides a wide variety of actions and omissions that are considered "unprofessional conduct," and the list is not exhaustive.² Being convicted of murder is included, but so is illegible handwriting in patient records and the release of confidential client information, even when the release is merely negligent and not intentional or knowing. There is

¹ 12 AAC 40.967(2).

² AS 01.10.040(b): "When the words 'includes' or 'including' are used in a law, they shall be construed as though followed by the phrase 'but not limited to.'"

nothing about failing to comply with a duty imposed by the state legislature that is inconsistent with the definition of “unprofessional conduct” in 12 AAC 40.967.

Finally, Dr. Abbott questions whether it was the intent of “the authors” of 12 AAC 40.930 to include an omission such as his. It should be observed that, as the entity that adopted the regulations, the board is in the best position to know what it intended when it adopted 12 AAC 40.930 and 12 AAC 40.967, regardless of whether the individual members of the board have changed over the years.³ The board’s recent approvals of memoranda of agreement treating failure to disclose malpractice settlements and judgments as unprofessional conduct meriting disciplinary sanctions indicates that the board did intend failure to report a settlement claim within 30 days to be regarded as an act of unprofessional conduct, regardless of the licensee’s mental state.

Dr. Abbott next argues that the division’s recommended penalty of a \$1,000 fine and a reprimand is excessive in light of the facts that he did report the settlement on the next licensing period’s renewal application and that he had no intent to deceive the board or withhold information.

This Board has authority to administer a range of disciplinary sanctions, including reprimand, censure, probation, license limitations or conditions, and civil fines. The maximum fine is \$25,000.⁴ The board “shall be consistent in the application of disciplinary sanctions.”⁵ This does not mean that the Board cannot change its policy over time, but if the Board decides upon “a significant departure from earlier decisions . . . involving similar situations,” it must explain the departure.⁶

Instances of licensees failing to report settlements within thirty days are not without precedent. A selection of recent cases involving failure to report a settlement within 30 days are summarized below:

³ *United Parcel Service Company v. Department of Revenue*, 1 P.3d 83, 87 (Alaska 2000)(“The department’s interpretation of its own regulations deserves considerable deference.”)

⁴ AS 08.64.331(a).

⁵ AS 08.64.331(f); *see also* AS 08.01.075(f).

⁶ *Id.*

Case	Date	Misconduct	Sanction
<i>Skam</i> 2800-04-057	January 24, 2008	Malpractice case settled February 13, 2004. Licensee fully disclosed on license application on November 1, 2004. Licensee timely reported to NPDB, Bartlett Regional Hospital, and State of Nevada as required by that state's law.	\$1,000 fine and reprimand
<i>Casey</i> 2800-08-07	July 24, 2008	Malpractice claim settled on June 7, 2007. NPDB reported to board in September, 2007. Licensee reported to boards of all states in which he held license in September, 2007.	\$1,000 fine and reprimand
<i>At Poulos</i> 2800-08-017	October 23, 2008	Licensee settled malpractice claim on March 6, 2007. Board received notification on July 7, 2008.	\$1,000 fine and reprimand
<i>Savit</i> 2800-08-018	October 23, 2008	Licensee settled malpractice claim on November 29, 2007; board received notification on July 21, 2008. Licensee is independent contractor radiologist residing in Australia and relying on private service to timely notify 43 states in which he is licensed and 1,009 hospitals in which he has privileges.	\$1,000 fine and reprimand
<i>Miller</i> 2807-09-001	October 22, 2009	Malpractice case settled August 29, 2008. Licensee, a physician assistant, reported to board on April 10, 2009. Licensee was unaware of 30-day reporting requirement.	\$1,000 fine and reprimand
<i>Helzerman</i> 2800-08-029	April 16, 2009	Malpractice claim settled on August 10, 2007. Licensee notified board on October 24, 2008, in renewal application containing full and fair disclosure. Licensee was unaware of 30-day reporting requirement.	\$1,000 fine and reprimand
<i>Fenner</i> 2800-09-001	April 16, 2009	Malpractice claim settled February 15, 2008. Licensee "fully and fairly" reported in license renewal on December 22, 2008. Licensee was unaware of 30-day reporting requirement.	\$1,000 fine and reprimand

A memorandum of agreement is not a perfect precedent for a contested case, as it can always be argued that in a settled case the division may have agreed to a lesser penalty in exchange for an agreement, or, conversely, that the licensee might have agreed to a stiffer penalty than the case warranted in order to avoid a hearing and to quickly conclude the matter.

Nevertheless, the board's approval of at least seven settlements in less than two years with identical penalties provides a very consistent pattern.

In the contested case of *In the Matter of Kohler*⁷ the board considered the case of a licensee who had, among other misdeeds, failed to report a settlement agreement within 30 days. That case is similar in that the licensee reported the settlement on the next license renewal application when asked by a question on the application form. The order that the board adopted in that case states that

While Dr. Kohler's medical malpractice settlement report was 13 months late – submitted on the required form on January 3, 2008 – he first informed the Board in his renewal application dated December 27, 2006, that the malpractice action had, indeed, reached a settlement the previous month. Thus, based on the court documents, Dr. Kohler was literally only two weeks late in notifying the Board of the malpractice settlement.

In *Kohler*, the board adopted the administrative law judge's finding that the licensee "should be fined \$1,000 each for the two incidents of failure to disclose prior investigations and \$500 for his failure to provide a medical malpractice report, for a total fine of \$2,500." Thus, *Kohler* represents the one variation from the line of cases in which the fine for not reporting a malpractice settlement within 30 days was \$1,000. The principal distinction between *Kohler* and any of the other cases is the length of time past thirty days that the board received actual notice of the settlement. At two weeks, the *Kohler* case represents the shortest delay of any of the recent cases.

In this case, Dr. Abbott reported the settlement on his renewal application about 23 months after the settlement was entered into. The executive administrator sent Dr. Abbott a letter about the matter on May 31, 2007, and Dr. Abbott reported the settlement on an official form in September of 2008. Dr. Abbott testified that he completed the form and returned it immediately, and the board received it six days after Dr. Abbott received the blank form from the division.

The division emphasizes the difference in time and the much later reporting in this case than in the *Kohler* case. It may have been somewhat fortuitous in the *Kohler* case that the renewal came due just weeks after the settlement, but nevertheless the board's receipt of the settlement disclosure just a few weeks after the thirty-day period seems to have been the basis for the reduced fine in that case. While the delay in reporting in the *Kohler* case was the shortest of

⁷ *In the Matter of Kohler*, OAH case no. 07-0367-MED, board case nos. 2800-05-037, 2800-05-056 (adopted July 28, 2008).

all the cases the board has recently considered, Dr. Abbott's delay of almost two full years was longer than any of the cases recently considered, and nearly as long as it could possibly be before another renewal form came due. While there is an element of fortuitousness when the time between the settlement and the next renewal is short, and arguably a bit of mere bad luck that in Dr. Abbott's case the malpractice claim was settled just after Dr. Abbott's renewal instead of just before, it is clear that Dr. Abbott's case has much in common with the multiple cases in which the fine was \$1,000, and little in common with the one case in which the fine was \$500.

A final issue concerns the division's framing of this case as two counts, one a violation of AS 08.64.345, and one a violation of 12 AAC 40.930(c), both of which prohibit the same conduct. The division advocates that two identical penalties be imposed, one for violation of the regulation and one for violation of the statute.

The regulation appears to be the board's implementation of the statute, providing additional detail as to how physicians should report settlements (i.e., on a provided form). The *Kohler* decision adopted by the board observed, "The Board does not ordinarily sanction separately for unprofessional conduct when it is just another manifestation of the same actions."⁸ This instant case involves one instance of misconduct, and one set of sanctions is appropriate.

All of the previous cases involved a written reprimand. The reprimand in this case should be similar to that adopted by the board in *Kohler*, but with the language changed to reflect that this case involves negligent disregard of Alaska law rather than a failure to truthfully answer questions.

IV. Conclusion

Dr. Abbott failed to report the settlement of a malpractice claim in which damages were paid on his behalf, on a prescribed form, within 30 days, an omission that constitutes unprofessional conduct under Alaska law. Consistent with previous cases, the following disciplinary sanctions shall be imposed:

1. A civil fine of \$1000.00 shall be imposed; and
2. Dr. Abbott is subject to the following official reprimand:

⁸*Id.*

The Alaska State Medical Board expects licensees to be aware of and comply with the statutes and professional regulations governing the practice of medicine in Alaska. Your failure to report a malpractice settlement in a timely manner placed you in violation of applicable statutes and regulations. The Alaska State Medical Board hereby reprimands you for failure to report a settlement within 30 days, as required by law.

DATED this 1st day of December, 2009.

By: *Signed* _____
DALE WHITNEY
Administrative Law Judge

Adoption

The Alaska State Medical Board, in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 4th day of February, 2010.

By: *Signed* _____
Signature
Jean M. Tsigonis, MD
Name
Alaska State Medical Board Chair
Title

[This document has been modified to conform to technical standards for publication.]